THE RISE OF LITIGATION FUNDING AND CLASS ACTIONS AND THE DUTIES OWED BY LEGAL PRACTITIONERS

The Hon Justice MJ Beazley AO[*]

President, New South Wales Court of Appeal

1 The ethical practice of the law involves the creation and maintenance of a culture of good practice with values that one would want to see reflected in society more generally. That calls for a fine balance which invites the lawyer to examine the manner in which each individual conducts themselves in the practice of the law and also requires the lawyer to understand their fundamental professional obligations. As I suggest in this paper, it also invites an understanding of what is happening in legal practice more generally.

2 Innovative technology, including the creation of Smart Contracts and Artificial Intelligence aside, the two aspects of litigation that have arguably had the most impact on the underpinnings of the lawyer/client relationship in the last 25 years have been the emergence of class actions and litigation funding. In proportionate terms, class actions and actions which are funded by third parties, are quite small. However, their impact on traditional litigation, on courts and on lawyer's duties, is disproportionate to the actual number of such claims.[1]

3 It is not the relative proportion of class actions and litigation funding in legal practice that I wish to examine in this paper, nor the precise rules which

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* I wish to express my thanks to my Tipstaff, Brigid McManus, for her research and assistance in the preparation of this paper.

[1] See generally, Damian Grave, Ken Adams and Jason Betts, *Class Actions in Australia* (Lawbook, 2nd ed, 2012) 784.

govern class actions, but rather, their impact on the courts and on the relationship between lawyer and client and lawyer and the court. In that context, questions arise as to the societal impact of the availability of class actions and litigation funding and where they sit in terms of the administration of justice, of which litigation and the litigation lawyer is such a fundamental part. This also leads to questions of the shape of the legal market and Australia's position in the wider legal global market.

4 It is well understood that law contributes to the gross national product of a country. The corollary is that the law can have a positive or negative impact on the economy, depending upon the way it is practiced. The latter point was made by the High Court in *Aon Risk Services Australia Ltd v Australian National University*.[2] Justice Heydon, after observing that "*commercial life depends on the timely and just payment of money*", stated that "*the efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce*".[3]

5 The plurality gave full credence to this reality, but also adverted to the huge social impact that litigation has on individual litigants, including the individuals who form the fabric of a corporation, those who may be witnesses, or persons whose jobs might depend on the outcome of the litigation or on the way it is managed by the lawyers.[4] The matters to which I have just referred are also true of class actions and funded actions.

6 Whilst I appreciate that some of these larger questions may not directly impact upon the daily practices of many lawyers, it is important, in my view, for lawyers to have an understanding of what is happening in legal practice more widely, to think about the implications of current developments in the practice of the law and to understand the role that law plays in the wider community. Besides, it should not be assumed that a lawyer, not usually

[2] [2009] HCA 27; (2009) 239 CLR 175.
[3] Ibid [137] (Heydon J).
[4] Ibid [101] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

engaged in such claims, will not be asked by a party involved in a class action or funded litigation about difficulties that have arisen in that litigation. A lawyer might also find themselves acting for a litigation funder.

7 The availability of class actions and litigation funding has other implications. One such question relates to s 56 of the *Civil Procedure Act 2005* (NSW). Section 56 requires that actions be conducted by all involved in the litigation process – the Court, the legal representatives and the clients – in a way that is "*just quick and cheap*" as is appropriate to the nature of the matter.[5] The question that arises is where do class actions, usually monolithic in themselves, sit with that statutory requirement?

8 There is also the High Court's recent injunction against the conduct of "*satellite*" interlocutory litigation, used either as a blocking tactic or which involves the taking of an opportunistic advantage of an error of the opposing side.[6] In *Expense Reduction*, the High Court stated that the trial judge should have immediately permitted a firm that had mistakenly included privileged documents in the non-privileged portion of the notice of discovery to amend the list of documents and ordered the party who had taken advantage of the mistake to return the privileged disks.

9 The High Court also referred to what was required of the legal representatives in that situation.[7] Essentially, the Court emphasised what an effective and well understood ethical culture should have made obvious. The Court referred to the Solicitors Rules in other States (and now as also enacted in NSW)[8] that required practitioners to return material which was known, or reasonably suspected, to be confidential where there had been inadvertent disclosure. However, as the Court stated:

[5] *Civil Procedure Act 2005* (NSW) s 56(1).
[6] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46; (2013) 250 CLR 303.
[7] Ibid [64]ff.
[8] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

> "Such a rule should not be necessary. In the not too distant past it was understood that acting in this way obviates unnecessary and costly interlocutory applications.
>
> This approach is important in a number of respects … it is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice."

10 Against that background, and before dealing with the professional and ethical obligations that can arise in class actions and funded litigation, let me remind you of your basic duties as a lawyer.

Basic features of the legislation

11 In July 2015, the *Legal Profession Uniform Law* was introduced to create a uniform scheme of professional obligations across Australia. The Uniform Law regulates almost all aspects of legal practice, including practicing certificates, trust accounting, continuing professional development requirements, billing, complaints and professional discipline. The Law Society of New South Wales and the Office of the Legal Services Commissioner both perform regulatory oversight duties.

12 In addition, the Uniform Law created two new bodies, the Legal Services Council and the Commissioner for Uniform Legal Services Regulation, that are responsible for setting the policy framework for the Uniform Law scheme and for monitoring its operation. They do so by making rules about the operation of the scheme, issuing guidelines and directions to legal regulatory authorities to ensure cross-jurisdictional consistency and advising the Attorneys-General of each state on potential amendments to the scheme.[9] This includes making the Uniform Rules, which regulate lawyers' professional obligations.[10]

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[9] The Law Society of New South Wales, 'A New Framework for Practising Law in New South Wales' <http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ruleslegislation/nationalreform/>.
[10] Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

The statutory duties and obligations

13 The statutory rules include a restatement of the common law rules as to a lawyer's primary duty.[11] Rule 3 provides that "[*a*] *solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty*". Flowing from this is a duty to responsibly use court proceedings, established by r 21 of the Uniform Rules. This provides that:

> "**21 Responsible use of court process and privilege**
>
> 21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:
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> 21.1.1 is reasonably justified by the material then available to the solicitor,
>
> 21.1.2 is appropriate for the robust for the robust advancement of the client's case on its merits,
>
> 21.1.3 is not made principally in order to harass or embarrass a person, and
>
> 21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court."

14 The second fundamental duty of the lawyer is to the client. The duty has contractual, professional and fiduciary dimensions. Its significance is recognised by Pt 2 of the Rules which concerns the "*fundamental duties of solicitors*". Specifically, r 4.1.1 provides that a solicitor must "*act in the best interests of a client in any matter in which the solicitor represents the client*". This involves amongst other fundamental duties the avoidance of conflicts of interest. In an amplification of the duty, r 11.1 provides that "*a solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients*".

15 Uniform Rule 12.1 provides that a solicitor "*must not act for a client where there is a conflict between the duty to service the best interests of a client*

[11] *Gianarelli v Wraith* (1988) 165 CLR 543, 572 (Wilson J).

and the interests of the solicitor or an associate of the solicitor" except as permitted by the Rules. This is followed by r 12.2, which provides that a solicitor "*must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration*".

16 It is often suggested, by academics in particular, that implicit in this rule is recognition that underlying all solicitor client relationships is a tension between the solicitor's interest in making a larger income and a client's interest in paying as little as possible.[12] I do not support that observation in the unqualified way in which it is stated. However, there must be a real question as to what I describe as the linear conduct of litigation – where every procedural step is taken to its fullest – when there may be shorter routes to a conclusion. Indeed, I see *Expense Reduction Analysts Group v Armstrong Strategic Management* as judicial disapprobation of such conduct.

17 These obligations to the client and the court constitute the core of the lawyer's professional duties. Academic lawyers have suggested, however, that class actions in particular have challenged "*lawyers' fundamental beliefs about the role of law in society, the role of the courts and the nature of society*".[13]

18 There is a certain truth in this. Class actions have enabled the bringing of claims that involve small losses to individuals but which in aggregate bring huge profits to major corporations. To that extent, it involves a rebalancing of economic interests and power structures. Because the conduct of a class action at many levels is very different from the conduct of ordinary litigation,

[12] See Larry May, *The Socially Responsible Self: Social Theory and Professional Ethics* (University of Chicago Press, 1996) 126.
[13] Grave, Adam and Betts, above n 1, 13

courts have had to be particularly proactive in the case management of class litigation, particularly in respect of the settlement of actions.[14]

Class actions

19 It is not the function of this paper to examine class actions and the rules of court[15] that govern them except to call attention to two aspects that need to be borne in mind. There has to be a legal or factual base that is common as between the representative party and the group, and the members of the class are bound by the result of the litigation, although they do not take part in the litigation itself.[16]

20 A recurring concern, which for many years hampered the introduction of class action legislation, was the fear that class actions promote "*predatory*" and entrepreneurial litigation and foster a litigious culture which encourages cases to be brought in breach of the lawyers' duty, found in r 21, to make responsible use of the court process. This was fuelled by comparison with the American context, where opportunistic class action litigation is said to be endemic.[17]

21 Generally these concerns appear to be ill-founded in the Australian context. Although there has been an increase over time in the number of class actions brought in Australian courts, in the period up to August 2016, an

[14] Michael Legg et al, 'The Rise and Regulation of Litigation Funding in Australia' (2011) 38 *Northern Kentucky Law* Review 626, 656.
[15] Australia's first class action regime was introduced in the form of Part IVA of the *Federal Court of Australia Act 1976* (Cth), which sought to create 'an efficient and effective procedure to deal with multiple claims'.
The Pt IVA form of action provides in s 33C that where:
(1) seven or more persons have claims against the same respondent;
(2) all those claims arise out of the same, similar or related circumstances; and
(3) all the claims give rise to a substantial common question of law or fact;
a proceeding may be commenced by 'one or more' of those persons 'representing some or all of them'. The members of the group are not parties to the action and do not need to give their consent for an action to commence: s 33G; *Timbercorp Finance Pty Ltd (in Liq) v Collins and Tomes* [2015] VSC 461, [259]. This model has now been adopted in largely the same form in the Supreme Courts of Victoria and New South Wales: see *Supreme Court Act 1986* (Vic) pt 4A; *Civil Procedure Act 2005* (NSW) pt 10.
[16] See, eg, *Federal Court of Australia Act 1976* (Cth) s 33ZB.
[17] See, eg, Grave, Adams and Betts, above n 1, 15.

average of just over 15 representative proceedings were filed each year under the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act), while approximately seven per year were brought in Victoria and just under four were brought per year in New South Wales.[18]

22 However, the landscape is not unsullied.

23 In *Treasury Wine Estates Ltd v Melbourne City Investments Ltd*, the Victorian Court of Appeal stayed an action as an abuse of process in circumstances where it was found that the class action was brought for the "*predominant purpose*" of enabling the sole director of the representative party to earn legal fees by acting as the representative party's solicitor.[19]

24 The facts briefly were these. Melbourne City Investments was incorporated by a solicitor for the sole purpose of bringing a class action against certain listed companies alleging breaches of the companies' continuous disclosure obligations, with Melbourne City Investments being the representative plaintiff in the actions. The company had purchased shares in the targeted companies, all less than $700 total in value, including 143 shares in Treasury Wines and 39 shares in Leighton Holdings. The anticipated maximum recovery per group member, if the action were successful, was $700.

25 Treasury Wines sought to have the proceedings stayed as an abuse of the process of the Court on the basis that the solicitor, who, as the sole director and shareholder of Melbourne City Investments and acting as its solicitor, had commenced the proceedings for the sole purpose of earning legal fees from the litigation. It had been part of the solicitor's rationale, or perhaps even his modus operandi, that class actions almost inevitably settle.

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[18] Vince Morabito, *An Empirical Study of Australia's Class Action Regimes: Fourth Report: Facts and Figures on Twenty-Four Years of Class Actions Australia* (Department of Business Law and Taxation, Monash University, September 2010) 2–3.
[19] [2014] VSCA 351; (2014) 45 VR 585, [1].

26 That was not an overly optimistic expectation, although the actual figures are more conservative: for example, approximately 50 per cent of class actions commenced under Pt IVA of the *Federal Court Act* are resolved by settlement.[20]

27 The primary judge in *Melbourne City Investments v Treasury Wine Estates* refused to stay the proceedings. In the Court of Appeal, Maxell P and Nettle J granted a permanent stay. In their joint judgment, their Honours said:

> "12 … In the present case, MCI is using the cause of action to create an income-generating vehicle for its solicitor. It has no interest in vindicating its rights, or obtaining a remedy, as such.
>
> 13 The nature of the cause of action – as a claim based on an alleged breach of disclosure requirements – is immaterial to MCI's purpose. Its sole purpose has only ever been to create for itself – in this case, by acquiring a small parcel of shares – a cause of action of sufficient merit to induce the defendant company to pay Mr Elliott's fees.
>
> 14 It seems to us that this is a clear example of an abuse of process. The processes of the Court do not exist – and are not to be used – merely to enable income to be generated for solicitors. On the contrary, they exist to enable legal rights and immunities to be asserted and defended. In the common form of class action, that is the sole purpose of the proceedings. The members of the class wish to vindicate their rights. The fact that success will result in the solicitors' fees being paid does not affect the propriety of the proceeding."

28 Kyrou JA would have refused to stay the proceedings on the basis that the proceedings as commenced were not an abuse, the same finding that had been made by the primary judge. It is to be noted that it was not suggested that the proceedings were devoid of merit. The primary judge and Kyrou JA approached the matter on the basis that costs were a likely and natural consequence if the claim succeeded and would form part of the compensation payable for bringing the action.

29 However, the primary judge had seen a clear conflict in the solicitor's position as the effective lead plaintiff, that is, as sole director and

[20] Morabito, above n 18, 2.

shareholder and in his role as solicitor. Her Honour considered that it was reasonable to characterise the solicitor's conduct as being in the business of buying small shareholdings in listed companies with the objective of commencing group proceedings and that his business model was likely to be dependent upon the outcome of such proceedings.

30 Her Honour identified the conflicts that can arise in class actions. In *Melbourne City Investments v Treasury Wine Estates* the conflict of interest arose because, as the primary judge found, by reference to the objective observer test:

> "… there would be a real risk that [the solicitor] could not give detached, independent and impartial advice taking into account not only the interests of MCI (and its potential exposure to an adverse costs order), but also the interests of group members."[21]

The primary judge pointed out that:

> "… it [is] important that the solicitor who is acting for the plaintiff is independent, so that forthright and strident advice is given, untainted by the personal interest of the lawyer beyond their normal interest."[22]

31 The consequence of that finding was not that the proceedings were an abuse of process, but that the solicitor should not act as the solicitor in the matter whilst Melbourne City Investments was the representative party. Consequently, new independent solicitors were retained by Melbourne City Investments.

32 In the Court of Appeal, Kyrou JA rejected Treasury Wine's complaint that the appointment of new solicitors was not sufficient, it being suggested that the solicitor would continue to give legal advice behind the scenes. His Honour observed there was no evidence to support that contention and considered that the original solicitor and the new solicitors "*can be expected to honour their undertakings*" (given to the Court) and that the new solicitors would be "*expected to provide independent and arm's length legal advice*" and deal

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[21] *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* [2014] VSC 340, [50].
[22] Ibid.

with the original solicitor on a solicitor client basis as the "*alter ego*" of the lead plaintiff.[23]

33 Four matters emerge from the case.

34 First, it provides an example of a case where traditional legal principles were invoked, but were trumped by the policy considerations to which the majority referred.

35 Secondly, one of those legal principles is worth re-iteration: if a proceeding is an abuse of process there is no discretion to refuse stay.

36 The third matter is an amplification of the first point. There was a significant difference in approach as between the majority on the one hand and the primary judge and Kyrou JA on the other. The approach of Kyrou JA might be described as a strictly legal approach. The approach of the majority was bedded both in legal principle and policy. At [9], their Honours stated:

> "As the law stands, the only legitimate purpose for bringing a proceeding is to vindicate legal rights or immunities by judgment or settlement."

The majority's approach is summarised in their conclusion at [22]:

> "Ultimately, the policy considerations which inform the law relating to abuse of process are twofold: to ensure that the processes of the Court are used fairly, and to maintain public confidence in the ability of the Court to function in that way. In this case, there is a palpable unfairness in a defendant being brought to court for the predominant purpose of enriching the plaintiff's solicitor, and the community's confidence would undoubtedly be shaken if that were held to be a legitimate purpose for bringing proceedings."

37 Fourthly, Kyrou JA's observations at [82] (see above at [32]) are an expression of the Court's reliance on legal representatives honouring their professional obligations.

[23] *Treasury Wine Estates Ltd v Melbourne City Investments Pty Ltd* [2014] VSCA 35, [82].

Other areas of potential conflict

38 Class actions also create the potential for conflict to arise between the interests of the solicitors for the representative party, the representative party and the duties which may be owed to other group members.[24] This is particularly so in the context of a settlement, which will bind all group members, regardless of the extent to which they participate in the class proceedings.

39 The factors that may give rise to a conflict include:

- the consequences of the class action costs rules;
- the relative position of the lawyers' interests and the group members;
- The relative position of the lawyers and representative parties on the one hand and the group members on the other;
- The interaction between the principle of the just quick and cheap settlement of disputes and the inherently slow and resource intensive nature of class actions.

The consequences of the costs rules

40 Under the class action costs regimes in the various Australian jurisdictions, the representative party is prima facie liable for any adverse costs order made against the plaintiff in the litigation.[25] This potentially means that the representative party is more likely to be risk averse than the group as a whole, who risk losing little by continuing to pursue a claim.

[24] Grave, Adams and Betts, above n 1, 631.
[25] E W Gillard, 'Group Proceeding – Start to Finish' (Paper presented to Specialist Forum: Advanced Civil Litigation, Seminar 2: Group Proceedings, Law Institute of Victoria, Professional Development, 29 March 2004) 18.

41 The representative party also exercises what has been described as "*near total dominion*" over the proceedings, creating significant potential for their interests to take precedence over those of the other group members.[26] This is particularly evident when settlement is proposed.

42 In order to balance the conflicting interests of group members and legal practitioners and the representative party and group members, court approval is required to settle proceedings commenced as a class action.[27] Under Pt IV of the *Federal Court Act*, this involves examining whether the proposed settlement is "*fair and reasonable*" and:

> "… has been undertaken in the interests of group members … and not just in the interests of the applicant and the respondent."[28]

This involves considering factors such as:

> "(a) the complexity and likely duration of the litigation;
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> (b) the reaction of the class to the settlement;
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> (c) the stage of the proceedings;
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> (d) the risks of establishing liability;
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> (e) the risks of establishing loss or damage;
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> (f) the risks of maintaining a class action;
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> (g) the ability of the respondent to withstand a greater judgment;
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> (h) the range of reasonableness of the settlement in light of the best recovery;
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> (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and
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> (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding."[29]

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[26] Damian Grave and Ken Adams, *Class Actions in Australia* (Lawbook Co Ltd, 2005) 132.
[27] *Federal Court of Australia Act 1976* (Cth) s 33V; *Civil Procedure Act 2005* (NSW) s 173; *Supreme Court Act 1986* (Vic) s 33V.
[28] See Class Actions Practice Note (GPN-CA) (Cth) [14.4].
[29] *Williams v FAI Home Security (No 4)* [2000] FCA 1925; (2000) 180 ALR 459, [19].

43 An example of the manner in which these conflicts can arise can be seen in *Williams v FAI Home Security Pty Ltd (No 4)*.[30] In that case, the settlement offered was in respect of a small number of potential class members, just under 500 in all, in circumstances where the group was possibly in the order of 20,000. The class, as defined in the statement of claim, was of persons who had purchased a particular alarm system from FAI, with the purchase being financed by FAI Finance. The amount involved in each case was approximately $1,000.

44 The case was complicated by a segment on *A Current Affair*, with the solicitor appearing on the program and identifying members of the class, essentially consistent with the statement of claim, as "*ordinary Australians who have purchased FAI Security Guard home loans*". It was described as a "*very important case for consumers*". FAI struck back with allegations against the solicitors that the first statement of claim in the class action had been struck out and that the solicitors acted on a contingency fee basis taking a percentage of the settlement. Both assertions were incorrect. It was known that FAI's counter-attack had reached group members but it was not known to what extent.

45 An offer to settle was made to the approximately 500 consumers who had contacted the solicitors and entered into a retainer and fee agreement with them. That offer, confined to the particular group who had retained the solicitors, had thus significantly changed the extent of the class action. It was a huge financial advantage to the respondents to settle with that group rather than with the group as originally identified in the statement of claim. It was an advantage to the confined group to settle, as they were getting nearly the full value of their loss at a relatively early point in the litigation.

46 In fact, no notice had been given to group members, notifying them of the proceedings and their right to opt out, as required under the Federal Court

[30] [2000] FCA 1925; (2000) 180 ALR 459.

Act.[31] Justice Goldberg considered that notice was required to be given to the group as a whole, not simply the particular group who had retained the solicitors. His Honour considered that:

> "… it would frustrate the policy and purposes of Pt IVA to allow a respondent to a representative proceeding to settle with a representative party and some of the group members without giving the remaining group members, not beneficiaries of the proposed settlement, the opportunity, by notice, to consider the consequences of the proposed settlement and to consider whether any of them wished to take over the role of representative party."[32]

In these circumstances, Goldberg J considered that it would be necessary for notice to be given to **all** group members before settlement was approved.[33]

47 Justice Goldberg proceeded to refuse to approve the settlement on the basis that it was inconsistent with the policy behind class action proceedings to allow a settlement for only some of the members of the group, leaving the remaining members of the group to pursue such avenues of claims as may be open to them, without those members first being given the opportunity to be heard on their proposed exclusion from the group.

48 His Honour observed, at [41], that the courts' task in considering an application for approval of a settlement was onerous, especially where the application was not opposed. His Honour further stated that the task was "*more onerous in circumstances such as exist in the present case where a conflict of interest appears within the class of group members as presently defined*".

49 This conflict was of particular concern, given that members of the group may have been affected by the campaign in which FAI had engaged to discredit the solicitors. There was another concern, namely, that persons who saw the *A Current Affair* program might understand that they were members of the

[31] *Federal Court of Australia Act 1976* (Cth) s 33X(1).
[32] *Willams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925; (2000) 180 ALR 459, [30].
[33] Ibid [31].

group.[34] However, no indication had been given on the program that they were required to contact the solicitors, let alone retain those solicitors and sign a fee agreement in order to benefit from the litigation. Nor does a class action require that they do so to be a member of the group.

50 For the same reason, Goldberg J stated that an amendment to the statement of claim to narrow the identity of the group would not be permitted without an opportunity being afforded to those who fell within the group as the claim was initially pleaded, to be heard on the amendment.[35] In other words, Goldberg J would not permit the forensic tool of amendment to be used without hearing from those who would be adversely affected by it.

51 Another problem confronted the solicitors who, on behalf of the limited group of class members, sought approval of the settlement. The settlement included approval of their fees of approximately $400,000. Justice Goldberg, whilst stating that he did not make any assumptions as to the appropriateness or otherwise of those fees, nonetheless stated that it was necessary for solicitors, seeking approval of their fees as part of a settlement, to provide evidence to enable the court to determine whether the fees were fair and reasonable having regard to the work performed.[36]

52 A different problem arose in *Mobil Oil Australia Pty Ltd v Victoria*,[37] which involved a challenge to the constitutional validity of Victorian class action legislation. While this challenge was underway, loss adjudicators retained by the respondents directly approached various members of the group and advised them that they could settle for 60 per cent of what they claimed or wait several years for the case to be finalised and risk receiving nothing.[38] On this basis, many members proceeded to settle for less than they claimed. The case was ultimately successful in the High Court, meaning that had they

[34] Ibid [9]–[12].
[35] Ibid [46].
[36] Ibid [47].
[37] [2002] HCA 27; (2002) 211 CLR 1.
[38] See Bernard Murphy and Camille Cameron, 'Access to Justice and the Evolution of Class Action Litigation in Australia' (2006) 14 *Melbourne University Law Review* 399, 429–30.

declined to settle, they would have received much more. It would seem the court could have little control over that occurring.

53 In some circumstances, the respective interests of the representative party and legal representatives may create a risk of collusion between the representative party and the respondent, where it is in both their interests to settle a matter early.[39] While there are no particular instances of this occurring in Australia, it is nevertheless a live issue.[40] I would also suggest that the *Mobil Oil* case was a variant of this problem.

54 At this point, it is important to identify the parties to the solicitor/client relationship and therefore to whom the duties of a solicitor are owed. The duties are clearly owed to the representative party and to any party who signed a retainer, as was the case in *Willams v FAI Home Security* where nearly 500 persons had signed retainers and fee agreements with the solicitors. In that case, the duties would be owed to each and every individual who had signed a retainer agreement.

55 The potential for conflict in acting for such a large number of persons is obvious, leaving aside entirely the conflict identified by the court as between that group, and the unknown members of the group as originally defined by the statement of claim. Lawyers need to be conscious of this potentiality for such conflict.

56 In *King v AG Australia Holdings*[41] Moore J suggested that solicitors have an obligation to conduct class actions consistent with the interests of the entire group. The approach of the court in *Williams v FAI Home Security* supports the view taken by Moore J. That duty is consonant with the requirements of r 11.1, notwithstanding that the members of the group are not, or usually are not, direct clients of the solicitor. If the duty is owed to the group as whole

[39] Michael Legg, 'The Aristocrat Leisure Ltd Shareholder Class Action Settlement' (2009) 37 *Australian Business Law Review* 399, 406.
[40] Grave, Adams and Betts, above n 1, 632.
[41] [2002] FCA 872; (2002) 121 FCR 480, [27].

the stance taken by the court in *Williams v FAI Home Security* is an indication that the duty is fiduciary.

57 Professor Michael Legg also suggests that solicitors owe a fiduciary duty to group members.[42] In *Hospital Products Ltd v United States Surgical Corporation*,[43] Mason J identified the critical feature of all fiduciary relationships as being:

> "… that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense."[44]

58 His Honour further explained that it:

> "… is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed".[45]

59 Actual trust or confidence is not necessarily a feature of a fiduciary relationship.[46] In *Meagher, Gummow and Lehane*, attention is drawn to the fact that the parties to the fiduciary relationship may have never met.[47] Elsewhere, the relationship has been described as one in which the parties are not free to pursue their own interests.[48]

60 In arguing that lawyers in class actions owe fiduciary obligations to group members, Degeling and Legg argue that "*the absence of a contract of engagement between solicitor and client does not prevent fiduciary*

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[42] Simone Degeling and Michael Legg, 'Fiduciary Obligations of Lawyers in Australian Class Actions: Conflicts between Duties' (2014) 37 *UNSW Law Journal* 914.
[43] (1984) 156 CLR 41.
[44] Ibid 96–7.
[45] Ibid.
[46] See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 69 (Gibbs CJ).
[47] J D Heydon, M J Leeming, P G Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 142.
[48] See P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 31ff.

obligations from arising".[49] That view is based principally upon the statement in *Beach Petroleum NL v Abbott Tout Russell Kennedy*, where it was said that:

> "Even in the case of a solicitor-client relationship, long accepted as a status based fiduciary relationship, the duty is not derived from the status. As in all such cases, the duty is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances. Not every aspect of a solicitor client relationship is fiduciary. Conduct which may fall within the fiduciary component of the relationship of solicitor and client in one case, may not fall within the fiduciary component in another."[50]

61 The Court in that case went on to explain that:

> "It is well-established that a person may take upon herself or himself the role of a fiduciary by a less formal arrangement than contract or by self-appointment. … But whether the relationship derives from retainer, a less formal arrangement or self-appointment, it must be examined to see what duties are thereby imposed on the fiduciary and the scope and ambit of these duties."[51]

62 However, it must be remembered that a fiduciary's duties are proscriptive and given the often small size of the individual claims in a class action, it is likely that the practical implications of a solicitors' duty to the group will be managed by the court in the course of its overview of an action, including its settlement.

Conflict between lawyers and group members

63 Solicitors may also face a conflict between their own interests and the group members' interests. Many firms will take on class actions on a no-win, no-fee basis, creating an incentive to settle and thus receive payment.[52] These arrangements are recognised as ethically complex, as they give a legal practitioner a stake in their client's case.[53] However, they have been accepted in Australia on the basis that any such conflict is outweighed by the

[49] Degeling and Legg, above n 42, 923.
[50] (1999) 48 NSWLR 1, 45.
[51] Ibid 46, citing *Boardman v Phipps* [1967] 2 AC 46, 100, 118, 126–7.
[52] Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 300.
[53] Ibid.

public interest in facilitating access to justice through providing a vehicle for claims that might not otherwise be brought for financial reasons.[54]

64 Professor Legg suggests that lawyers in this context are "*potentially an unreliable agent of the class*" and notes that "*the class is unable to effectively monitor the lawyer*".[55] He considered that not only are they likely to have too little at stake to expend resources in this respect, they also face a significant information imbalance.[56]

65 This is, of course, a consideration in any such arrangement, whether in a class action or otherwise. Whilst I accept that it is an important consideration, it is moderated in the class action context by two further considerations. The first is the court's control over the approval process. The second is a combination of the required professionalism of the lawyers involved, including by compliance with the statutory rules of the profession embodied in the *Legal Profession Uniform Law*, and the ethical outlook of lawyers that seminars such as this are designed to keep at the forefront of practitioners' minds.

The just quick and cheap paradigm in the context of class actions

66 The largest settlement of a class action in Australia, *Matthews v AusNet Electricity Services Pty Ltd*, which settled for $494 million, demonstrates the complexities involved in the settlement and ongoing supervision of the settlement of class actions.[57] The action concerned claims brought in the wake of the Kilmore East-Kinglake bushfires in Victoria in February 2009. The case proceeded before the court over some 16 months, with numerous experts giving evidence, particularly in relation to causation. Judgment was reserved at the time that a settlement was reached. The application for

[54] See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 203.
[55] Michael Legg, 'Judge's Role in Settlement of Representative Proceedings: Lessons from United States Class Actions' (2004) 78 *Australian Law Journal* 58, 68.
[56] Ibid.
[57] [2014] VSC 663.

approval of the settlement was heard by a different judge from the judge who heard the trial.

67 In determining whether to approve the settlement, Osborn JA had regard to the length of the proceedings, the extensive negotiations which took place between the parties and the fact that there was little opposition from group members.[58] In particular, his Honour emphasised the importance of a just, efficient and timely result in a case which had already experienced substantial delay.[59]

68 The deed of settlement contemplated that the firm acting for the representative party, Maurice Blackburn, would be paid $60 million for costs and disbursements of, and incidental to, the investigation and prosecution of the claims.[60] Justice Osborn considered whether this sum was fair and reasonable, having regard to the conditional costs agreement entered into, the assessments of independent costs experts and the conduct of the solicitors during the trial and after the proposed settlement was reached.[61] The judge also considered the fact that the proceedings were not funded by a third party funder, meaning that the solicitors had borne "*the entirety of the core financial risk*".[62]

69 Another potential area of conflict arises in the distribution of settlement monies. In many cases, large law firms will administer the settlement scheme. In this capacity, they owe duties to all class members, not simply their client, the representative member. Although the precise nature of the duty has not been the subject of analysis, I would venture that the duty is fiduciary. In this regard a comparison can be usefully drawn with an external administrator of a company. Among those fiduciary duties is an administrator's duty to refrain from using their position to make personal

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[58] Ibid [427]–[434].
[59] Ibid [70].
[60] Ibid [346].
[61] Ibid [379]–[386].
[62] Ibid [382].

gains other than to earn their proper remuneration. This alteration in the relationship between the parties can be addressed by an order that the firm cease acting for the representative party or any other group member.[63] However, this does not mean that issues will not arise.

70 In *Matthews v AusNet Electricity Services Pty Ltd*, a distribution scheme was established, to be administered by a senior partner of the solicitors acting for the representative party. Significantly for our purposes, the deed of settlement provided that group members with personal injury claims would have their claim assessed by an independent barrister and the court would have ongoing supervision of the implementation of the scheme.[64]

71 Unfortunately, "*a considerable degree of acrimony*" developed between members of the group and between members of the group and the scheme's administrator.[65] The case has been back before the Victorian Supreme Court 44 times for supervision and further orders, most recently in November 2016. On this last occasion, Forrest J dealt with concerns raised by group members regarding the cost of the administration of the settlement distribution scheme by Maurice Blackburn and the independence of a Special Referee appointed to monitor the issue.[66] Another area of concern was the introduction of financial incentives for counsel carrying out assessments of personal injury claims in order to ensure that the assessments were completed in a timely fashion.[67]

72 Justice Forrest declined to intervene in both respects, noting that "[*i*]*t is not the Court's role to monitor every decision made by the Scheme Administrator*". Nevertheless, these issues demonstrate the difficult positions that lawyers can find themselves in when they take on positions

[63] See *Stanford v DePuy International Pty Ltd (No 6)* [2016] FCA 1452.
[64] [2014] VSC 663, [342].
[65] [2016] VSC 732.
[66] Ibid [13]–[17].
[67] Ibid [18].

such as these which go beyond what were once the traditional boundaries of a lawyer's role.

73 The matters to which I have made reference raise real questions as to the role of the lawyer in the modern litigation framework. This question is particularly acute in the case of the Scheme Administrator. Is the Scheme Administrator acting as a lawyer? What role can, or should, lawyers play in this context? And, perhaps more importantly, what professional obligations are in play? There are other questions. How do solicitors resolve conflicts between the group as a whole and the representative party? Should the Uniform Rules take account of such complex arrangements? Do we need to rethink the role of the lawyer more broadly?

Litigation funding

74 Some of the same issues arise in relation to litigation funding. Litigation funding, also known as third party funding, involves a contractual arrangement whereby a litigation finance company advances money to a plaintiff to cover the cost of litigation in exchange for a percentage of the proceeds if the case succeeds.[68] This share varies according to the risk involved in the case and is typically between one third and two thirds of the proceeds.[69] In some cases it has been up to 75 per cent of the amount recovered.[70]

75 Historically, third parties were prohibited from funding litigation by the common law doctrines of maintenance and champerty, which sought to prevent the courts from being used for speculative business ventures.[71]

[68] Legg et al, above n 14, 625; Nicholas Dietsch, 'Litigation Funding in the US, the UK and Australia: How the Industry Evolved in Three Countries' (2011) 38 *Northern Kentucky Law Review* 687.
[69] Michael Legg and Louisa Travers, 'Necessity is the Mother of Invention: The Adoption of Third-Party Litigation Funding and the Closed Class in Australian Class Actions' (2009) 38 *Common Law World Review* 245, 254.
[70] Renee Leon, Chief Executive, ACT Department of Justice and Community Safety, 'Funding Litigation – A Need for Regulation?' (Speech at the 2007 Conference of the Australian Insurance Law Association, 21 September 2007) 2.
[71] Susan Lorde Martin, 'Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?' (1992) 30 *American Business Law Journal* 485, 485.

Maintenance took the form of "[*i*]*mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case*".[72] Champerty was a type of maintenance, "[*a*]*n agreement to divide litigation proceeds between the owner of a litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim*".[73]

76 The ACT, New South Wales, South Australia and Victoria have abolished both maintenance and champerty.[74] In those jurisdictions which have not, it is likely that maintenance and champerty are no longer considered to be either crimes or torts at common law,[75] although this does not extend so far as to permit contracts "*contrary to public policy or … otherwise illegal*".[76]

77 In 1995, legislative reforms were introduced by the Commonwealth government to allow insolvency practitioners to contract for third party funding of lawsuits which could be characterised as "*company property*".[77] A market in litigation funding arose as a result, which soon expanded into financing class actions.[78] This growth was enabled by the landmark High Court decision in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*,[79] which considered the legality of litigation funding and held, by majority, that litigation funding was not in itself an abuse of process or contrary to public policy.[80] The Court considered that the doctrine of abuse of process (if proceedings were in fact an abuse), the ability of the courts to otherwise protect their processes and lawyers' **ethical** and **professional** duties were

[72] Dietsch, above n 68, 689.
[73] Ibid.
[74] *Civil Law (Wrongs) Act 2002* (ACT) s 221(1), *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) ss 3, 4; *Criminal Law Consolidation Act 1935* (SA) sch 11 ss 1(3), 3(1); *Wrongs Act 1958* (Vic) s 32; *Crimes Act 1958* (Vic) s 322A.
[75] See *Clyne v NSW Bar Association* (1960) 104 CLR 186, 203.
[76] See, eg, *Wrongs Act 1958* (Vic) s 32(2).
[77] Standing Committee of Attorneys-General, 'Litigation Funding in Australia' (Discussion Paper, May 2006) 5.
[78] Dietsch, above n 68, 703.
[79] (2006) 229 CLR 386.
[80] Ibid 432–3.

more than adequate to address circumstances in which a funder conducted themselves in a manner "*inimical to the due administration of justice*".[81]

78 Litigation funding is now a highly profitable industry in Australia. It is dominated by six or seven companies, who account for 95 per cent of all litigation funding.[82] To give some idea of the size of this market, in 2009 IMF (Australia) Limited received a net income of almost $39 million.[83] The extent to which litigation funding is now used to fund class actions is evident in the fact that in 2008 IMF held a portfolio of $132 million in insolvency investments, $280 million in commercial investments and $928 million in group actions.[84]

79 This development is by no means unique to Australia. The last 10 years have seen litigation funding become an accepted part of legal systems in many common law jurisdictions, such as the US, Canada, New Zealand and the UK – about which I'll say more in a moment – as well as in civil law countries, such as Germany, Austria, Belgium and the Netherlands.[85] It has, however, been more widely accepted and "*arguably more successful*" here than in many other jurisdictions.[86] In fact, it has been described as an 'Australian export', with Australian litigation funders funding actions across the world.[87]

80 A 2011 study in the UK suggests that litigation funding has not improved access to justice in any meaningful sense.[88] While small- to medium-sized companies appear to have benefited from litigation funding, individual

[81] Ibid 435.
[82] Simon Dluzniak, 'Litigation Funding and Insurance Report', (Report, IMF (Australia) Limited, March 2009) 2.
[83] IMF (Australia) Limited, 2009 Annual Report (2009) 4.
[84] Wayne Attrill, 'Litigation Funding: Access to Justice in a Time of Economic Crisis' (Paper presented at Global Law Asia Pacific Regional meeting, Auckland, 20 February 2009) 8.
[85] Wayne Attrill, 'Litigation Funding' in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis, 2016) 307, 309–10.
[86] Dietsch, above n 68, 702.
[87] Legg et al, above n 14, 629.
[88] Christopher Hodges, John Peysner and Angus Nurse, 'Litigation Funding: Status and Issues' (Research report, Centre for Socio-legal Studies, Oxford and Lincoln Law School, 2 July 2010).

plaintiffs have not similarly benefited.[89] In Australia, litigation funders tend to primarily target corporate clients, although they have serviced a wider field than that of the UK.[90] It is also convenient to note at this stage that figures taken out in 2013 revealed that the average Australian class action took four years to settle, at an average cost of $45 million, not to mention the disruption this causes for businesses involved.[91]

81 Although in *Campbells Cash & Carry v Fostif* it was held that litigation funding is not in itself an abuse of process, this does not mean that litigation funding will not raise other public policy issues. One of the primary concerns surrounding it is the extent to which it promotes undue litigation, treating the courts as money-making machines. Unlike a party, a litigation funder "*stands to reap substantial benefits*" without the correlative risk of an adverse costs order.[92]

82 In *Jeffrey and Katauskas Pty Limited v SST Consulting Pty Limited*,[93] the High Court held that a third party who funded proceedings did not thereby commit an abuse of the process of the court nor was there any obligation on the funder to ensure the litigant was placed in funds to meet an adverse costs order.

83 At the time, the *Uniform Civil Procedure Rules 2005* (NSW) prevented a defendant from seeking a costs order against a non-party, such as a litigation funder.[94] The rule was subject to the Court's power to make such an order when a person had committed a contempt of court or an abuse of process of the court. The following year, this rule was repealed. Under s 98 of the *Civil Procedure Act (NSW)*, the courts' discretion to make costs orders

[89] Ibid 69.
[90] Dietsch, above n 68, 707.
[91] Kieran O'Brien and Natasha Stojanovich, 'Class Actions', *Lexology* (4 May 2016) <http://www.lexology.com/library/detail.aspx?g=b72e3c3d-d205-4659-b5a7-c9c629fe4bfb>.
[92] Legg et al, above n 14, 646.
[93] [2009] HCA 43; (2009) 239 CLR 75.
[94] Uniform Civil Procedure Rules 2005 (NSW), r 42.3.

is now unfettered. The position in Victoria is similar; s 24 of the *Supreme Court Act 1986* confers a broad discretion regarding costs orders.

84 The ability of a judge to make non-party costs orders with respect to litigation funders was considered by the Victorian Court of Appeal in *Carter v Caason Investments Pty Ltd*[95] in which the plaintiffs had obtained litigation funding from Global Litigation Funding Pty Ltd. The plaintiffs failed in their claim and, despite there having been an earlier order for security for costs, the defendants were not able to recover the full amount claimed.[96]

85 Non-party costs orders were made against the litigation funder, Global, its sole shareholder – another company – and an individual who was the sole director and secretary of Global. The trial judge observed that Global stood to gain substantially from its investment in the case and while the plaintiffs retained the right to direct the conduct of the proceedings, they agreed to consult Global "*on all matters*".[97] In particular, they agreed not to settle the proceedings or reject an offer without consulting Global.[98] Based on these factors, the judge found that "*Global was not merely a passive funder, but by reason of what it stood to gain, could properly be characterised as a party to the proceeding*".[99]

86 On appeal, the Court emphasised the fact that "*Global was involved in the litigation purely for commercial gain. There was no public interest component to the proceeding*".[100] Given these circumstances, along with the fact that "*the litigation would not have proceeded to completion without Global*" and the fact that the relevant parties were put on notice regarding the possibility

[95] [2016] VSCA 236.
[96] Ibid [4].
[97] Ibid [17].
[98] Ibid.
[99] Ibid [24].
[100] Ibid [38].

of a negative costs order against them, the Court of Appeal held that there was *"ample basis"* for the trial judge to exercise his discretion as he did.[101]

87 Importantly, the Court considered that it was bound by the High Court decision in *Knight v FP Special Assets Limited*, a case concerning the costs of receivers who had been appointed to a corporation which had unsuccessfully sued the respondent, where Mason CJ and Deane J (Gaudron J agreeing) stated:

> "For our part, we consider it appropriate to recognize a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or a [person] of straw, **where the non-party has played an active part in the conduct of the litigation** and where the non-party or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."[102] (emphasis added)

88 As with class actions, litigation funding also establishes complex intersecting relationships which create the potential for conflicts of interest between the legal practitioner, the client and the litigation funder.[103] Conflicts can arise in a number of areas, primarily in relation to the strategies used to pursue litigation and the issue of when and whether to settle.[104] For funders, litigation is a profit-generating activity, meaning they have no legal or ethical obligations to 'zealously' protect the client's interest, although the terms of the contract will determine, in large measure, the nature and extent of the relationship.[105]

89 Litigation funders are unlikely to finance litigation that clients may wish to pursue for non-economic reasons which of itself may serve to rationalise the

[101] Ibid [38].
[102] (1992) 174 CLR 178, 192–3.
[103] Vicki Waye, 'Conflicts of Interests between Claimholders, Lawyers and Litigation Funders' (2007) 19 *Bond Law Review* 225, 225.
[104] Ibid 237.
[105] US Chamber Institute for Legal Reform, 'Third Party Financing: Ethical and Legal Ramifications in Collective Actions' (Report, 2009) 1.

litigation process.[106] By contrast, there may be a risk that settlement may be too readily forced upon a client to the client's financial detriment but to the funder's and the solicitor's benefit.

90 This financial focus may also influence legal representatives, given the close relationship in many cases between lawyers and litigation funders. Waye suggests that even when "*lawyers consciously regard themselves as acting in their client's best interest … unconsciously economic dependence on a funder has the potential to colour their advice to clients*".[107] Although no specific incidences of that occurring were identified, some attempt to address the potential for any such conflicting interests, or at least to bring them out in the open, has been addressed in the Federal Court, and the Supreme Courts of Victoria and NSW which require that parties in class actions disclose any litigation funding agreements "*at or prior to the initial case management conference*".[108] The fact of transparency in itself may be thus seen by the court as enhancing the due administration of justice.

91 Legal representatives may also seek to address conflicting obligations through the terms of the contract of retainer with a client. The extent to which this is permitted was considered by the NSW Court of Appeal, in C*ampbells Cash and Carry v Fostif*, where Mason P upheld the validity of a contract that allowed a third party funder to maintain day-to-day control of a proceeding where the legal representatives continued to consult with the representative on key issues. His Honour suggested, however, that the contract would be contrary to public policy if the legal representatives had fully abdicated their obligation to act for the representative party.[109]

92 Although it is often suggested that the potential for the issues discussed above to arise is compounded in the case of class actions, Waye suggests

[106] Waye, above n 85, 237.
[107] Waye, above n 103, 239.
[108] Class Actions Practice Note (GPN-CA) (Cth); Practice Note No SC Gen 17 – Representative Proceedings (NSW); Practice Note 9 of 2010 – Conduct of Group Proceedings (Vic).
[109] *Fostif v Campbells Cash & Carry Pty Ltd* (2005) 63 NSWLR 203, [85].

that "*the interposition of a funder in the lawyer-client relationship is likely to reduce rather than exacerbate potential lawyer-defendant collusion*".[110] This is because the funder will ultimately want to maximise the amount they receive and therefore the amount the funded party receives, discouraging low-reward settlements.[111]

Conclusion

93 As is the case with sliced bread, class actions and litigation funding are and will remain part of the fare of litigation – albeit not necessarily everyday fare. Such litigation can and does give rise to real issues for lawyers – including the possibility of conflicts of interest. It is difficult to generalise as to what those potential conflicts might be, beyond those that have emerged in the decided cases.

94 From an ethical viewpoint, there is no obstacle to lawyers acting in class actions or arranging for or engaging in litigation funding. It would be unfortunate, however, for a profession which is part of and integral to the administration of justice if such processes were used, not to bring well-based claims against wrongs but solely as an entrepreneurial mechanism that benefitted only the lawyers. One would hope that Dick's admonition in Shakespeare's Henry VI "*let's kill all the lawyers*" does not become the clarion call of the modern populace.[112]

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[110] Waye, above n 103, 260.
[111] Ibid 260–1.
[112] William Shakespeare, *Henry VI*, act 4, scene 2.